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**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-749

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PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY,  
SQUIBB CORPORATION, OLIN CORPORATION and THE SUPREME COURT, U.S.,  
APR 1 1977

*Petitioners,*

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE  
REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**PETITIONERS' JOINT REPLY TO THE MEMORANDUM  
OF THE UNITED STATES AS AMICUS CURIAE**

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April 1, 1977

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Petitioners respectfully submit this reply to the Memorandum of the United States as Amicus Curiae (hereafter "Gov. Mem."), filed in response to the Court's order of January 25, 1977.

The Department of Justice does not dispute the importance of the question whether foreign countries are "persons" entitled to sue for treble damages under Section 4 of

the Clayton Act, but it opposes the petition for certiorari on the ground that the question was "correctly decided" by the court of appeals. Gov. Mem. at 7. The basis for the Department's conclusion is said to be that "[t]he United States agrees with . . . the court of appeals that permitting foreign governments to sue for treble damages effectuates the congressional purpose to afford 'any person' . . . a treble damage remedy." Gov. Mem. at 2-3. But no such reasoning is to be found in the court of appeals' decision. The majority based its conclusion on a mechanical application of *Georgia v. Evans*, 316 U.S. 159 (1942), reasoning that since this court had held that a State was a person entitled to sue, Congress must have "intended other bodies politic, such as a foreign government, to enjoy the same right." Pet. App. B-7. Indeed, five of the court of appeals' eight judges (three in concurrence and two in dissent) indicated that the decision did not effectuate any Congressional purpose since they believed that "Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." See Appendix to the Petition herein ("Pet. App.") B-8, A-1; A-2. The three concurring judges, whose votes controlled the outcome, held that foreign governments were "persons" because they thought that result was "mandated" by this Court's decision in *Georgia v. Evans*, 316 U.S. 159 (1942). Pet. App. B-8, A-1. But those judges were manifestly troubled by the policy implications of their decision, since they stated, not that their decision furthered the intent of Congress, but that, in their opinion, it was "time for Congress to re-examine this extremely important question and clarify it by legislation." Pet. App. B-8.

The Justice Department cites no authority to support its conclusion that it was the intention of Congress to grant the treble damage remedy to foreign governments. Gov. Mem. at 4. Indeed, this Court recently noted that "[t]he

discussions of [the treble-damage remedy] on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S.Ct. 690, 696 n.10 (No. 75-904, decided Jan. 25, 1977). It is obvious that such purpose is not furthered by extension of the remedy to foreign governments.

The Department also contends that extension of the remedy to foreign governments would "supplement the federal government's limited enforcement capacity with private suits, so as to deter future violations." Gov. Mem. at 3. But it is improbable that Congress would have thought it appropriate to recruit foreign governments, most of which do not espouse our nation's antitrust principles, to assist the Executive Branch in enforcing our laws.

The Justice Department does not dispute our arguments that extension of the remedy to foreign governments could have adverse effects upon the commercial interests of the United States. Rather, it asserts that "these are arguments to be addressed to Congress." Gov. Mem. at 5. But the Federal Courts should not impute to Congress an intent to disregard such concerns. The Congresses which enacted the Sherman and Clayton laws were especially alert to foster and protect the American economy. See, e.g., McKinley Tariff Act of 1890<sup>1</sup>; Webb-Pomerene Act of 1918.<sup>2</sup> Those concerns were not discussed upon enactment of the Sherman law because Congress could have had no notion that the Sherman Act's treble-damage remedy could be extended to foreign governments. In drafting the Act, the Senate Judiciary Committee had defined "person" and excluded foreign governments from the definition. See 15 U.S.C. §§ 7, 12.<sup>3</sup> Congress was undoubtedly aware that in

1. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.

2. Act of Apr. 18, 1918, ch. 50, 40 Stat. 517 (codified as 15 U.S.C. §§ 61-65 (1970)).

3. See Pet. at 13 n.10.

1874, sixteen years earlier, it had purposefully narrowed the definition of "person" as used in the Revised Statutes, so as to delete "bodies politic," such as states and foreign governments, from the list of entities to which the term person "may apply and be extended" in federal legislation. See authorities cited, Pet. at 12-13. For purposes of the Sherman Act, Congress broadened the general definition somewhat.<sup>4</sup> Congress did not seek to overcome the rule of statutory construction, established by the 1874 statutory amendment and by Supreme Court decision (see *United States v. Fox*, 94 U.S. 315, 321 (1876)), that "person" should not be extended to include bodies politic, such as co-equal governments, without special definition.

The Department of Justice argues that the purpose of Congress's definitional amendment of 1874 should simply be disregarded, since it "proves too much," and might be taken to suggest that *Georgia v. Evans* itself was wrongly decided. See Gov. Mem. at 3 n.2. We have already noted that the amendment and its purpose appear not to have been called to the Court's attention when *Georgia v. Evans* was decided in 1942. See Pet. at 16.<sup>5</sup> Even if the Court had considered the amendment, however, it might well have concluded that the larger purposes of the Sherman Act's treble-damage remedy, conceived as a remedy for "the people of the United States," dictated extension to the States, as representatives of their citizens. Indeed, since the States had delegated the Commerce Power to Congress

4. The general definition left the courts some discretion providing that person "may apply and be extended" to corporations; the Senate Judiciary Committee removed any doubt in this regard as to the antitrust laws by providing that person "includes" corporations. See Sherman Act § 7, 26 Stat. 210. This Court's decision in *United States v. Fox*, 94 U.S. 315, 321 (1876), might have been construed to mean that the term "corporation," when used in federal legislation, referred only to corporations organized under the laws of the United States, and the committee also obviated any question in that regard, specifically providing for inclusion of all corporations, regardless of their place of incorporation.

upon ratification of the Constitution, it would have seemed anomalous to conclude that Congress had exercised that power to enact comprehensive antitrust legislation but had chosen to leave the States without remedy thereunder.

Whatever the scope of *Georgia v. Evans*, the Justices who joined in that decision would surely have been astonished to learn that in allowing suit by States of the Union, they had "mandated" extension of the treble-damage remedy to foreign governments. As the court of appeals' dissenters observed, "if this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term 'person,' the definition of 'person' now should be even further expanded, then the majority have adopted a questionable principle of statutory construction." A-3. Without analysis of Congressional purpose, the court of appeals has accorded to the world's foreign governments a treble-damage right that Congress chose to withhold from our own government (see 15 U.S.C. § 15a) because it feared "the disastrous impact of treble damages upon concerns doing a large proportion of their business with the government." H.R. REP. NO. 422, 84th Cong., 1st Sess. 4 (1955). The impact of treble-damage claims by foreign governments could be even more severe. See Pet. 11.

The question presented on this petition is fundamental to the antitrust laws. Denial of the petition for certiorari would not resolve the question. The Eighth Circuit applied *Georgia v. Evans* in a mechanical manner that disregarded the policy and purpose of Congress, and its reasoning cannot be regarded as a definitive answer. Even the Department of Justice acknowledges that an "automatic approach" to the definition of person is erroneous, although it tries to ascribe that approach to petitioners rather than to the court

5. Mr. Justice Frankfurter, discussed the definitional statute without reference to the 1874 amendment or its purpose, in a law review article. See F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

of appeals' majority. *See* Gov. Mem. at 3 n.2. Denial of certiorari would have the effect of encouraging the world's foreign countries to make a significant investment in lengthy and complex anti-trust litigation before our federal courts, without resolving the essential question whether such countries do have a cause of action. Accordingly, the Court should proceed to resolve the question presented on this petition.

Respectfully submitted,

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